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No. 98-158

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELIZABETH TAYLOR GRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether, in a prosecution involving the sale of rocks of crack cocaine, the district court abused its discretion in admitting into evidence an anonymous note asking for "five rocks," where the note was addressed to petitioner and found in her house.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 10a-22a) is unpublished, but the decision is noted at 145 F.3d 1327 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1998. The petition for a writ of certiorari was filed on July 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the Middle District of North Carolina found petitioner guilty of conspiring to possess cocaine base (crack) with

intent to distribute it, in violation of 21 U.S.C. 846, and of possessing cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced her to concurrent terms of 80 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 10a-22a.

1. Petitioner and two co-defendants, Robert Allen Merritt and Thomas Elmore Harris, Jr., formed a crack distribution group that operated out of petitioner's house in Carrboro, North Carolina, near the University of North Carolina's Chapel Hill campus. In early 1994, Carrboro police officers apprehended Dennis McDowell, a student at the University, in possession of crack cocaine. McDowell later agreed to assist police and the Drug Enforcement Administration as an informant in drug investigations. At that time, McDowell had known petitioner, Merritt, and Harris for about nine months. At the request of police, McDowell called petitioner's residence on numerous occasions to arrange purchases of crack cocaine and its delivery to parking lots near petitioner's residence. Merritt, Harris, or a third man, Eddie Atwater, made the deliveries. Law enforcement officers recorded the telephone calls and deliveries and witnessed the deliveries. Pet. App. 11a-12a, 15a-16a, 19a.[1]

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[1] The evidence showed that petitioner was directly involved in at least three undercover purchases of crack cocaine by the informant McDowell. Pet. App. 16a-17a, 19a.

On September 14, 1994, McDowell called petitioner's residence and asked if she could "do five" rocks of crack cocaine. After petitioner confirmed that she could, she gave the telephone to Merritt to arrange a meeting place. Merritt delivered five rocks of crack cocaine to McDowell shortly thereafter. McDowell paid Merritt $100, or $20 per rock. Pet. App. 17a.

Based on that evidence, law enforcement officers obtained a search warrant for petitioner's residence. On August 30, 1995, during the execution of that search warrant, law enforcement officers seized an anonymous note handwritten on an envelope. Pet. App. 17a; GX 24. The note was addressed to "Lit," petitioner's nickname. The note read:

> Lit I have payed Lucille rent and turned her heat on. I am going to the motel for one more night and get some rest by myself so give me five rocks and $20 dollars and we will * * * add it up tomorrow.

C.A. App. 430; Pet. App. 14a n.4. The note was in a dresser drawer that also contained a woman's clothing and other documents bearing petitioner's name, including a county tax receipt. Pet. App. 13a-14a.

2. At trial, the government contended that the note was relevant and admissible because of its reference to "rocks" and because it was addressed to petitioner

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On October 13, 1994, McDowell again called petitioner. He told her that he wanted to get "fifteen" and that he had "300 beans." (McDowell testified that he was ordering 15 rocks of crack cocaine at $20 each, for a total of $300.) Petitioner asked him when he wanted to get it, and when he replied "sometime tonight," she said, "Well, let us know." In a second conversation, petitioner assured McDowell that she would wrap the crack "in brown wrapper or something." Atwater later delivered crack to McDowell. Pet. App. 17a.

On December 8, 1994, McDowell called petitioner a third time to buy crack cocaine, and Merritt later delivered one $20 rock to him. Pet. App. 17a.

In addition to the above transactions, McDowell set up several purchases directly with Harris and Merritt in 1994 and 1995. These purchases, observed by law enforcement officers, also originated at petitioner's residence, the center of operations for the drug enterprise. Pet. App. 17a, 19a.

under her nickname. C.A. App. 178. Petitioner's attorney acknowledged that the note had "some relevance," *id.* at 223-224, in that "on its face" the note showed that "someone * * * wrote something addressed to a person with my client's name indicating that they believed she would give them rocks," *id.* at 220. See also *id.* at 222 ("you can fairly conclude that someone thought she would give them rocks"). He nonetheless objected to admitting the note, on the grounds that it was hearsay, *id.* at 180, 183, 219, which "d[id]n't really add much" to the government's "pretty good evidence to proceed with against [petitioner]," *id.* at 224, including the tape recordings and McDowell's testimony, *id.* at 223. He also argued that what probative value the note did have was substantially outweighed by the danger of unfair prejudice. *Id.* at 179, 220, 223-224.

The district court found the note relevant and admissible. C.A. App. 223-224, 231. The court explained that the note was not inadmissible as hearsay, *id.* at 221, because the note was in petitioner's possession, *id.* at 181-182, 221,[2] and it "shows that somebody said something to [petitioner] about rocks, that [petitioner] had something in her possession about rocks," *id.* at 220. The court further explained that the note was not unfairly prejudicial simply because it was incriminating. *Id.* at 220, 224.

Immediately after admitting the note, the district court cautioned the jury to "consider the circum-

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[2] The court pointed out that "[petitioner] certainly is in charge of the property. That has never been contested." C.A. App. 219. (Earlier, defense counsel had offered to stipulate that petitioner lived in the house, *id.* at 213, "that she was in control of the house," *ibid.*, "that she has been there since 1993, and stayed there continuously all of 1994 and 1995," *ibid.*, and that the tax records found in the same drawer as the note "are in her name," *ibid.*).

stances" of "where it was and how it was found, and that sort of thing. * * * [I]t's your determination as to whether it applies to [petitioner] or not." C.A. App. 232-233.

3. On appeal, petitioner argued that the district court erred by admitting the note. The court of appeals affirmed. Rejecting petitioner's claim that "the note was hearsay under Fed. R. Evid. 801(c), and that it should have been excluded under Fed. R. Evid. 403," the panel held that the district court had not abused its discretion by admitting it into evidence. Pet. App. 13a.

With respect to the hearsay claim, the court noted that "[d]ocuments found in a defendant's possession may be admitted, not to prove the truth of the matter asserted, but to show the circumstantial relationship of the parties to the scene, the contraband or other parties." Pet. App. 13a (internal quotation marks omitted). The court also noted that a person's possession of a document was an adoption of its contents, thereby removing it from the hearsay exclusion, "[s]o long as the surrounding circumstances tie the possessor and the document together in some meaningful way." Pet. App. 14a (quoting *United States* v. *Paulino*, 13 F.3d 20, 24 (1st Cir. 1994)). See also Fed. R. Evid. 801(d)(2)(B). The court concluded that "the content of the note and its location" were sufficient to tie petitioner and the note together, and therefore the district court had discretion to admit it. Pet. App. 14a.

As for the Rule 403 claim, the panel "disagree[d]" with petitioner that the probative value of the note was substantially outweighed by its prejudicial effect. Pet. App. 14a. The panel reasoned that "[t]he note, addressed to [petitioner] and obviously evidencing drug activity, was admitted as additional evidence of [petitioner's] knowledge of and participation in the drug

conspiracy and to corroborate the taped drug negotiations between defendants and the informant." *Id.* at 14a-15a. See also *id.* at 17a (note showed an "additional" drug transaction between petitioner and an unknown buyer).

ARGUMENT

Renewing her challenge to the admissibility of the note, petitioner contends that the Court should resolve what she claims are intercircuit conflicts on when possession of a document constitutes an adoptive admission under Federal Rule of Evidence 801(d)(2)(B), Pet. 7-13, and on when a writing may be admitted as circumstantial evidence of guilt, Pet. 13-17. There are no conflicts calling for this Court's review. And even if there were error in admitting the note, it was clearly harmless beyond a reasonable doubt.

1. Petitioner's claim of a conflict fails at the outset because the court of appeals resolved her appeal in a per curiam, unpublished decision. According to the Fourth Circuit's internal rules, unpublished decisions are not precedential and are binding only upon the parties immediately before the court. See *Hogan* v. *Carter*, 85 F.3d 1113, 1118 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 408 (1996). The disposition below, therefore, does not create law for the Fourth Circuit and cannot implicate an intercircuit conflict that might warrant review.

2. a. Petitioner errs, in any event, in arguing that the disposition creates or widens an intercircuit conflict concerning adoptive admissions. Under Federal Rule of Evidence 801(d)(2)(B), an assertion is not hearsay if it is offered against a party and is "a statement of which the party has manifested an adoption or belief in its

truth[.]"[3] According to the Advisory Committee Notes, "[a]doption or acquiescence may be manifested in any appropriate manner. * * * The decision in each case calls for an evaluation in terms of probable human behavior." Fed. R. Evid. 801(d)(2)(B). The district court was within its discretion in finding that petitioner "manifested an adoption or belief in its truth" by retaining the note in her house ("the center of operations for the drug enterprise," Pet. App. 19a) among her personal effects and records as evidence of the author's debt to her for drugs and money ("give me five rocks and $20 dollars and we will * * * add it up tomorrow," C.A. App. 430; Pet. App. 14a n.4).

Petitioner argues that the Fourth Circuit in this case and the Sixth Circuit in *United States* v. *Marino*, 658 F.2d 1120 (6th Cir. 1981), have held that "possession equals adoption," Pet. 10, while the First, Ninth, and Tenth Circuits require "possession plus," see, *e.g.*, *Paulino*, 13 F.3d at 24; *United States* v. *Ospina*, 739 F.2d 448, 451 (9th Cir. 1984), cert. denied, 471 U.S. 1126

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[3] There is a substantial question whether the note here constituted an "assertion," as it simply communicated a request, demand, or order. Such a communication is neither true nor false and hence is not a "statement" for purposes of the hearsay rule. See, *e.g.*, *United States* v. *Hicks*, 848 F.2d 1, 3 (1st Cir. 1988) ("request for assistance" presents "no hearsay problem" because "there could be no 'truth' or falsity" in it); *United States* v. *Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984) ("An order or instruction is, by its nature, neither true nor false and thus cannot be offered for its truth."); *United States* v. *Keane*, 522 F.2d 534, 558 (7th Cir. 1975) (where comment at issue was "similar to an order," it was not hearsay because it was "not capable of being true or false"), cert. denied, 424 U.S. 976 (1976). Viewed as a request or order, the note presents no hearsay problems, and because the note is more probative than prejudicial, the district court did not err by admitting it.

(1985); *United States* v. *Jefferson*, 925 F.2d 1242, 1253 n. 13 (10th Cir.), cert. denied, 502 U.S. 884 (1991).

The Fourth Circuit's opinion did not adopt a strict rule that possession of a document alone constitutes an adoptive admission. While the panel quotes *Marino*, stating, "possession of a written statement becomes an adoption of its contents," Pet. App. 13a (quoting *Marino*, 658 F.2d at 1125), it then quotes *Paulino*, "[s]o long as the surrounding circumstances tie the possessor and the document together in some meaningful way, the possessor may be found to have adopted the writing and embraced its contents," *id.* at 14a (quoting *Paulino*, 13 F.3d at 24), and cites *Ospina*, *ibid.* Thus, even if the disposition below could be deemed to have precedential value, it would not stand for the proposition that "possession equals adoption."

Nor does the Sixth Circuit's decision in *Marino*. In *Marino* the defendants failed to object at trial to the documents whose admissibility they were challenging on appeal; the Sixth Circuit held that, "[b]ecause the admission of the documents was not plain error, the issue is not reviewable on appeal." *Marino*, 658 F.2d at 1124. Although the court went on to say that, "[i]n any event, the district court did not err in admitting the documents," the court's decision rests on the finding of no plain error. Thus, the court's additional statement that the defendants' possession of airline tickets and other documents "constituted an adoption," *id.* at 1124-1125, was dictum.

In any case, in a decision issued not long after *Marino*, the Sixth Circuit confirmed that, with regard to oral statements, "[a] defendant cannot adopt an out-of-court statement as his own without some affirmative action on his part." *Poole* v. *Perini*, 659 F.2d 730, 733 (6th Cir. 1981), cert. denied, 455 U.S. 910 (1982). See

also *Fuson* v. *Jago*, 773 F.2d 55, 61 (6th Cir. 1985) (relying on the language quoted from *Poole*), cert. denied, 478 U.S. 1020 (1986). While *Poole* involved an out-of-court oral statement, its general pronouncement regarding adoptive admissions implies that the law in the Sixth Circuit is not inconsistent with that in the circuits cited by petitioner. See *Paulino*, 13 F.3d at 24 ("so long as the surrounding circumstances tie the possessor and the document together in some meaningful way, the possessor may be found to have adopted the writing and embraced its contents"); *Ospina*, 739 F.2d at 451 (relying on *Marino*); *United States* v. *Carrillo*, 16 F.3d 1046, 1049 (relying on "the rule of *Ospina*"), aff'd in part, rev'd in part, *United States* v. *Corona*, 34 F.3d 876 (9th Cir. 1994); *United States* v. *Ordonez*, 737 F.2d 793, 800 (9th Cir. 1983) (distinguishing *Marino* on the grounds that, there, review was for plain error and the evidence at issue "was not offered for the truth of the matter asserted"); *Poy Coon Tom* v. *United States*, 7 F.2d 109, 110 (9th Cir. 1925) (admissibility of letter in defendant's possession pertaining to a drug transaction requires "proof tending to show that the letter was answered or otherwise acted upon"; pre-Federal Rules of Evidence decision last cited by Ninth Circuit in *Ordonez*); *Jefferson*, 925 F.2d at 1253 n.13 ("mere possession" of a bill is not an adoption of its contents).

b. Petitioner also errs in contending that the decision below conflicts with the Tenth Circuit's decision in *Jefferson* on the question of when a writing may be admitted as circumstantial evidence of guilt. Petitioner asserts that the Fourth Circuit "alternatively ruled that the note was admissible, 'not to prove the truth of the matter asserted, but to show the circumstantial relationship of the parties to the scene, the contraband

or other parties.'" Pet. 4 (quoting Pet. App. 13a). It is not at all clear that the panel so ruled. While the opinion states that, "[d]ocuments found in a defendant's possession may be admitted, not to prove the truth of the matter asserted, but 'to show the circumstantial relationship of the parties to the scene, the contraband or other parties,'" Pet. App. 13a (quoting *Marino*, 658 F.2d at 1124), the court devoted the greater part of its discussion of the law to a description of the requirements for an adoptive admission. See *id.* at 14a.

In any event, the *Jefferson* case on which petitioner relies is distinguishable. In *Jefferson*, the government attempted to avoid a hearsay problem by arguing that a pager bill should be admitted as circumstantial evidence to show the defendant's character and involvement with the crime. See 925 F.2d at 1252. Because any conclusion about the defendant's character or involvement relied on the truth of the matters asserted in the pager bill, the court found the bill hearsay and thus inadmissible. *Id.* at 1252-1253. The court emphasized that hearsay is inadmissible regardless of whether it is offered as circumstantial or direct evidence. *Id.* at 1253. In this case, the panel did not suggest otherwise. Instead, the panel noted that documents found in the defendant's possession may be admitted for purposes *other* than to prove the truth of the matters asserted therein, such as to show the circumstantial relationship of the parties to the scene. See Pet. App. 13a.

3. Finally, any error in admitting the note was harmless.[4] As the court of appeals explained, the note

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[4] That is the case even under the more stringent "harmless beyond a reasonable doubt" standard urged by petitioner on the premise that the admission of hearsay evidence here violated the

was simply "additional evidence of [petitioner's] knowledge of and participation in the drug conspiracy" and was used "to corroborate the taped drug negotiations between defendants and the informant." Pet. App. 14a-15a. Indeed, in opposing admission of the note at trial, defense counsel argued that it "doesn't really add much" to the evidence against petitioner, C.A. App. 224, which already included the tape recordings and "the testimony of the cooperating witness," *id.* at 223; see note 1, *supra*. Furthermore, the district court cautioned the jurors that the note was not dated and that they would have to decide whether it applied to petitioner. *Id.* at 232-233. In these circumstances, admission of the note cannot be said to have affected the outcome of the proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1998

Confrontation Clause. See *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986).